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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 229

UNITED STATES OF AMERICA EX REL.
ROBERT WEBER,

Petitioner;

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

and

EDWARD M. FAY, Warden of Green Haven Prison,
Stormville, New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 1, 1963, reversing an order of the District Court which had sustained petitioner's writ of habeas corpus.

Opinions Below

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 1b, is reported at 316 F. 2d 603. The opinion of the District Court, printed in Appendix C hereto, *infra*, p. 1c, is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1963, p. 4b, *infra*. A timely petition for rehearing filed on May 8, 1963 was denied on May 10, 1963. This petition is filed within 90 days thereafter.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. After a federal habeas corpus hearing granted a state prisoner who has attacked the constitutionality of his incarceration as a parole violator, was it not violative of the Due Process Clause of the Fourteenth Amendment, as enunciated in *Townsend* v. *Sain*, 372 U. S. 293, when:

   (a) believing itself precluded from questioning the factual determination of the Parole Board, the District Court declined to consider petitioner's proof that he had not committed the violation and that the Parole Board hearing was constitutionally inadequate; and

   (b) ignoring the uncontradicted proof of both sides at the District Court hearing that petitioner had always denied the violation, the Court of Appeals held there was no need to consider the quantum of proof before the Parole Board, in reliance upon the demonstrably erroneous factual allegation in a lower state court report that there was testimony before the Parole Board that petitioner had admitted the violation?

2. Does the constitutional prohibition under the Fourth, Fifth and Fourteenth Amendments, enunciated in *Ker* v. *California*, 31 U.S.L. Week 4611 and *Mapp* v. *Ohio*, 367 U. S. 643, against convicting a man of crime by using

testimony obtained from him by an unreasonable search and seizure, apply to the introduction in evidence on a parole revocation hearing before a state Parole Court of an alleged admission by petitioner that he had been arrested for gambling, made during the course of a lengthy police interrogation beginning at 4:40 A.M. with petitioner's arrest at his home without a warrant, without probable cause, and in connection with a charge of which he was concededly innocent?

3. Is Section 218 of the New York Correction Law violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, in that it denies a parolee the right to counsel at his Parole Court hearing to revoke his parole?

4. Was petitioner denied procedural due process under the Fourteenth Amendment when the warrant lodged against him failed to recite any charge or specification?

5. Were petitioner's rights under the Fourteenth Amendment violated when the four-year delay between the alleged gambling conviction in December, 1955 and the parole revocation hearing in April, 1960 effectively precluded a fair determination, since the arresting officer no longer knew whom he had arrested in 1955?

6. Should the Court of Appeals have dismissed respondent's appeal from the decision of the District Court which sustained the writ of habeas corpus and ordered petitioner's release, on the ground that respondent therein, Warden Fay, had failed to prosecute the appeal beyond filing a notice of appeal?

Constitutional Provisions and Statute Involved

The constitutional provisions involved are the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and New York State Correction Law, §218, which is printed in Appendix A, *infra*, p. 1a.

Statement of the Case

The jurisdiction of the District Court was invoked by petitioner, a state prisoner, on the ground that he was being detained in violation of his federal constitutional rights. The District Court sustained the writ of habeas corpus, directed to Warden Fay, and ordered his release. The Court of Appeals reversed upon an appeal brought, not by Warden Fay, but by the State of New York.

Weber is now 37 years old. He has been married for 20 years and has an 18 year old daughter. Approximately 13 years ago Weber was convicted of robbery in the second degree and was sentenced to imprisonment for five to ten years. He was paroled on September 26, 1953. The next time he had any conflict with the law was February 25, 1960 (19a).*

After Weber was paroled in September, 1953, he promptly got a job in a restaurant as a sandwich man. He quit to take a better job doing the same work, and he continued in restaurant work for 4½ years. After that he worked in construction for another two years. He worked steadily. At the time of his arrest on February 25, 1960, Weber lived with his wife and daughter at 488 Ocean Parkway, Brooklyn, New York. He was a foreman of a construction crew and earned about $175 a week (25a).

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* References are to respondent's appendix in the Court of Appeals.

During the 6½ year period of his parole, Weber reported regularly to his parole officer—at first once a week and then later once a month—and he never violated his parole by not reporting (25a).

On February 25, 1960, two detectives from the Safe & Loft Squad of the New York City Police Department came to his home at exactly 4:40 in the morning and, without any warrant, announced that they were taking Weber in for questioning, which they did. After questioning him at Police Headquarters about some burglaries, of which Weber knew nothing, they took him to prison the same day. At the time of his arrest Weber inquired as to the reason for his arrest and imprisonment. The detectives said, "We will come up with something" (20a, 66a, 70a).

What they dredged up was an alleged parole violation—the disorderly conduct conviction for participating in a dice game on December 17, 1955, more than four years previously, of a defendant who had given Weber's name and address and who had been fined two dollars (32a-33a).

Weber remained in prison on this charge until his release by Judge Noonan on December 3, 1962, almost three years later (481a).

After his arrest on February 25, 1960, Weber remained in the New York City prison for approximately 15 days, after which he was taken for questioning to the parole office at 320 Broadway. The parole officers said that they had found a dice game arrest in 1955 and that they would declare him a delinquent from that date unless he talked. They told him that, if he knew the answers to their questions, they would ignore the alleged violation concerning the dice game and let his parole period expire. One of these parole officers was named McCarthy (21a). McCarthy was not called as a witness by the respondent.

and respondent made no effort to contradict Weber's testimony. Weber denied the dice arrest, pointing out to the parole officers that if he had in fact been the one arrested in 1955 the parole officials would have known about it, because in 1956 the parole authorities gave him permission to go to Europe with his daughter after having investigated him (21a). Weber's parole officer conceded that Weber had been given permission to go to Europe many months after his alleged conviction. Respondent's own witness testified that this was a privilege which would not be given to a delinquent parolee, and that before such permission is given the parole officer checks the parolee closely (57a).

Moreover, on two other occasions Weber was thoroughly investigated while he was on parole—once in 1958 (59a), and again in September, 1959, when Weber was kept under close scrutiny by the Police Department and the Parole Board and no violation was found, other than the driving of a car (65a-67a, 70a).

After about 40 minutes of questioning, during which Weber said he would have to get a lawyer, he was returned to the prison, where he remained until March 25th. Weber was then taken to Sing Sing Prison where, on April 20, 1960, he met the Parole Board for his statutory hearing (23a, 60a). Almost two months elapsed between his arrest and the hearing (37a).

The Parole Board repeated the prior questioning of the Safe & Loft Squad, and Weber reaffirmed his ignorance of the matters (23a). They also asked him about the dice game in 1955, and Weber denied any knowledge of it (24a). At this parole hearing no proof of any other violation of law or of any other arrest or any other conviction was presented (24a). In fact, in a prior proceeding

in the state courts, the Court noted that the dice game was the ground for the parole revocation. *People ex rel. Weber v. Division of Parole*, 212 N. Y. S. 2d 761, 762 (Sup. Ct. Westchester Co. 1961), not officially reported.

Weber was not arrested on December 17, 1955; he was not in a dice game on that date; and he was not convicted of disorderly conduct on that date (26a-27a). Both on direct examination and cross-examination Weber denied having been arrested on December 17, 1955 and denied telling the parole officer of any arrest on that date (27a). The parole officer corroborated Weber (42a-43a).

It was impossible for Weber to present evidence in Sing Sing Prison at the belated Parole Board hearing on April 20, 1960 that he had not been arrested and fined two dollars on December 17, 1955. At the hearing before Judge Noonan respondent's counsel stated that the arresting officer, Detective Parotta, was still on the force, but that after seven years he had no recollection of the incident, and that is why respondent did not call him as a witness (77a).

Obviously Detective Parotta had not testified adversely to Weber at the Sing Sing hearing either, or else respondent's counsel would have refreshed his recollection with such prior testimony. Nor did Parole Officer Sullivan appear there (45a). However, his parole report erroneously stated that Weber had admitted the December 17, 1955 conviction. *People ex rel. Weber v. Division of Parole*, 212 N. Y. S. 2d at p. 763. Sullivan's testimony before Judge Noonan was that Weber did not admit it (42a-43a). Respondent cannot rely on Detective Swift's statement about a prior gambling arrest, for that concerned a statement allegedly made in Sullivan's presence (66a).

Since the Parole Board's determination of delinquency as of December 17, 1955 was based upon admittedly false information, respondent attempted to sustain the parole revocation by reliance upon Weber's having driven a car on three occasions in September, 1959 (29a, 47a), upon Weber's alleged consorting in early 1960 with a criminal (68a, 72a), and, perhaps, upon some unspecified charge of which no one was informed on respondent's plea of secrecy of state and federal information (48a-49a). As Mr. Weinberg candidly admitted, "The Parole Board filed a declaration of delinquency but it does not set forth the actual reasons for the revocation of parole" (38a).

These alleged delinquencies are irrelevant, because they would have required Weber to serve at most seven and one-half months, that is, from the first driving incident on September 7, 1959 (65a-66a) until the expiration date of April 3, 1960 (58a), and, prior to his release by the District Court, he had already served almost three additional years in jail as a parole violator.

In any case, while Weber, from the time of his arrest, admitted driving his brother's car late in 1959 (28a, 37a-38a), there was no proof that he had consorted with a criminal, except for Sullivan's hearsay testimony that he had been told by Swift that the criminal had a key to a safe-deposit box in Weber's name (41a, 62a). Said Sullivan, "That was verification as far as I was concerned" (62a). There was no such testimony from Swift, although he testified for respondent, and notwithstanding respondent's representation to the Court that Swift could testify to his own knowledge about the subject (69a). Moreover, respondent subpoenaed no records of or witnesses from the custodian of the safe-deposit box. Had it in fact been Weber's box, surely the signature card would have disclosed this.

Beginning in September, 1959, the parole authorities were cooperating with the New York City Police Department. They were waiting for the police to complete their investigation (58a, 60a-61a). Finally, on February 25, 1960 Weber was arrested, but no evidence was uncovered against him (61a). What the police wanted of Weber was the answers to certain questions about a robbery in which respondent conceded Weber had not participated (20a, 67a, 68a). Weber did not know the answers and went to jail for three years. The State of New York wants to send Weber back to jail for another year and a half—all because he was allegedly fined two dollars in Night Court on December 17, 1955.

REASONS FOR GRANTING THE WRIT

Question 1

The Court of Appeals erred in refusing to follow this Court's teaching in *Townsend* v. *Sain*, *supra*, and remand the case to the District Court, with instructions to hold a hearing upon the quantum of proof before the Parole Board on the issue of whether petitioner violated his parole.

Misplacing its reliance on erroneous factual allegations in *People ex rel. Weber* v. *Division of Parole*, 212 N. Y. S. 2d 761, 764-65, the Court of Appeals was misled into the belief that the Parole Board heard "the testimony of a parole officer and a detective that petitioner admitted the conviction" and concluded that "the District Court was correct in these circumstances in declining to enter upon a consideration of the quantum of proof that was before the Board of Parole" pp, 4b-5b, *supra*.

On the contrary, according to the sworn testimony before the District Court of respondent's own witnesses—the parole officer (Sullivan) and the detective (Swift): (1) the parole officer did not testify before the Parole Board (44a-47a); (2) petitioner "would not admit" the conviction to the parole officer (43a), but only, according to Sullivan, stated during the course of his lengthy interrogation that he had taken a couple of pinches* for gambling (42a-43a, 59a); (3) petitioner did not tell the detective that he had been convicted at any time of that he had been arrested on or about December 17, 1955, but only, according to Swift, that "he had been arrested some time previously for violation of a gambling statute" (66a).

To controvert petitioner's denial that he was the one convicted on December 17, 1955, the Parole Court had only the conviction record, which was unsupported by fingerprints or a photograph, and the erroneous report of the parole officer. See *People ex rel. Weber* v. *Division of Parole*, *supra*, at pp. 762-63, which states: "A Parole Court hearing was conducted by the Board on April 20, 1960, at which hearing petitioner personally appeared and denied that he was the Robert Weber who was convicted of said disorderly conduct charge on December 17, 1955, despite his parole officer's report that petitioner had admitted to him that he was the person so involved." It was incumbent upon the Parole Board to call as a witness the arresting officer of December 17, 1955, Parotta, in order to determine through testimony his recollection of the events and of the petitioner.

A hearing is required so that this testimony may be taken. It is no answer for respondent's counsel to say,

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* A "pinch" is the vernacular for an arrest. It does not mean a conviction. See, e.g., Webster's New International Dictionary, 3rd ed., unabridged, 1961.

"He [Parotta] had no recollection one way or the other so I thought there was no point to calling him" (77a). Under examination by petitioner's counsel Parotta may well testify to such effect that the District Court would credit petitioner's denial.

The teaching of *Townsend* v. *Sain*, *supra*, is that a hearing must be held where the state factual determination is not supported by the record as a whole, or the fact finding procedure was inadequate to afford a full and fair hearing, or there is a substantial allegation of newly discovered evidence, or the material facts were not adequately developed.

Petitioner has shown on the record before the District Court that the Parole Board's determination of delinquency on December 17, 1955 was based on an erroneous parole report, that the witnesses under control of the State who had knowledge of the crucial facts and who could have corrected the Parole Board's erroneous impression were not called as witnesses, and that the arresting officer, if called as a witness, would have failed to identify petitioner.

The District Court declined to consider the quantum of proof, not because the above facts were not made abundantly clear at the hearing, but because the District Court believed that it was precluded by decisional law from making any such review (11a, 38a-39a, 73a-74a, 76a). The Court of Appeals perpetuated this error by relying on erroneous matter outside the record to sustain the Parole Board.

The only evidence purporting to link petitioner to the December 17, 1955 gambling conviction and two dollar fine consisted of a record prepared on December 9, 1960—five years later (33a). It indicates only that the defend-

ant therein gave petitioner's name and address, and not that the defendant in fact bore petitioner's name and lived at his address. Surely more is required to justify petitioner's continued imprisonment.

The Parole Board's wide discretion is a legal discretion nonetheless, and the revocation of parole without substantial evidence is not an exercise of discretion but is an abuse of discretion. While the granting of parole is a matter of grace, the revocation of parole involves the legal right of the parolee to supervised liberty as long as he honors the terms of his parole. He may not be deprived of that right by arbitrary action.

The Fourteenth Amendment governs any state action, whether legislative, judicial, executive or administrative, and there is no reason why this Court should exclude the activities of the Parole Board from the restraints of the Fourteenth Amendment. On the contrary, once parole is granted, the parolee has a vested right to his conditional liberty of which he may not be deprived without due process of law.

The vindication of due process is the historic office of habeas corpus. See *Fay* v. *Noia*, 372 U. S. 391. The District Court had the power—indeed, the obligation—to take evidence relevant to petitioner's claims of unconstitutional detention and to try relevant facts anew in the hearing. *Fay* v. *Noia*, *supra*; *Townsend* v. *Sain*, *supra*. The Court of Appeals could not ignore the uncontroverted evidence adduced at the federal habeas corpus hearing and rely on erroneous matter outside the record.

This major issue involves the applicability of the Fourteenth Amendment to the hearing of a parole court. It merits this Court's attention, for it affects the work of parole boards in all states of the nation.

Question 2

The receipt in evidence of a statement by petitioner, allegedly made during an illegal arrest, together with its fruits, cannot be justified on the ground that he was a parolee. The constitutional safeguards of the Fourth, Fifth and Fourteenth Amendments apply to a parolee, and this Court should pass upon their applicability to this class, large in number and undergoing rehabilitation throughout the country. This issue affects the constitutional rights, not only parolees within each of the fifty state court jurisdictions, but federal parolees as well.

Petitioner was taken from his home without warrant at 4:40 A.M. and interrogated. The interrogation continued to at least 9 A.M. (27a, 41a, 70a). During the interrogation he is alleged to have said he had "taken pinches" for gambling (42a-43a). Testimony as to the alleged admission was improperly received against petitioner. Respondent contended throughout the state and federal habeas corpus proceedings that this statement of petitioner led the police to the record of his gambling conviction, upon which the parole revocation was based (15a, 36a-37a, 42a). This statement and any information obtained as a result of it should have been suppressed under the Fourth, Fifth and Fourteenth Amendments. *Ker* v. *California*, *supra*; *Wong Sun* v. *United States*, 371 U. S. 471; *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

It is no answer to say that petitioner was a parolee. It is doubtful that such status would permit a parole officer's entry without warrant at 4:40 A.M. when there was no emergency. Certainly, detectives of the Safe & Loft Squad can claim no right of midnight supervisory visitation and arrest. That a parolee is considered to be in custody for the purpose of sustaining a writ of habeas

corpus, see *Jones* v. *Cunningham*, 31 U.S.L. Week 4137, does not permit the police to arrest him without a warrant and without probable cause in the middle of the night in connection with a crime of which the police conceded he was innocent (20a, 67a, 68a). To hold a parolee liable to such onerous consequences is to permit cruel and unusual punishment in violation of New York State (Art. I, §5) and federal constitutional guarantees.

Question 3

In accordance with the prohibition against counsel contained in New York Correction Law, Section 218, petitioner was unrepresented before the Parole Court. This statutory prohibition against counsel at a Parole Court is a violation of the New York Constitution, Art. I, §6, guaranteeing the right to counsel, and Art. I, §11, guaranteeing the equal protection of the laws. See *People* v. *Waterman*, 9 N. Y. 2d 561, 565 (1961). The statutory exclusion of a class—parolees—from these New York constitutional guarantees is a denial of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and is contrary to the teaching of *Gideon* v. *Wainwright*, 372 U. S. 335.

The right to counsel should not be denied to a parolee whose liberty is under attack. This federal and state issue of national dimension calls for this Court's decision.

Question 4

In a revocation proceeding, as in a criminal trial, a man's liability to imprisonment depends upon a factual determination as to his conduct. Where such serious consequences follow from a determination, due process requires the use of procedures reasonably calculated to ensure that the determination will be accurate.

Clearly the parolee must be informed of the charge against him. Here the warrant lodged against petitioner merely read, "has violated his parole, or has lapsed or is probably about to lapse" (43a).

With this vague charge against him, petitioner faced the Parole Court, denied the opportunity to appear granted a parolee by Section 218 in that he had no notice of the violation charged, nor a proper opportunity to attack the charge. See *People* v. *Oskroba*, 305 N. Y. 113, 117 (1953).

Question 5

Petitioner was allegedly fined two dollars in Night Court for participating in a dice game on December 17, 1955 (32a-33a). He was arrested as a parole violator on February 25, 1960 (21a). On April 20, 1960 he was given a hearing under Section 218 of the Correction Law, whose terms prior to its amendment of July 1, 1960 required the hearing to be held at the Parole Board's next meeting, that is, in March 1960, and not "as soon as practicable", which provision only became effective on July 1, 1960 (23a; 60a).

The lengthy delay of more than four years from the time of the alleged violation until the hearing—and indeed the violation of petitioner's statutory right to a hearing in March, 1960—constitute violations of the Fourteenth Amendment. The delays were unreasonable and precluded a fair determination of the charge against petitioner, since, according to respondent's counsel, the arresting officer could no longer recall whom he had arrested (77a) and petitioner could no longer prove, except through his own testimony, that he had not been the dice player of December 17, 1955.

The factual finding of the District Court that there was no valid reason for the delay was amply supported by the

record, which showed that petitioner had been carefully investigated in 1956, 1958 and 1959 and that during the last two months of the delay petitioner was imprisoned (21a, 57a, 59a, 65a-67a, 70a).

Based upon that factual finding and the conceded showing at the hearing of manifest prejudice, there was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Question 6

The decision of the Court of Appeals is in direct conflict with a decision of the Sixth Circuit Court of Appeals in *Commanding Officer, U. S. Army Base* v. *United States ex rel. Bumanis*, 207 F. 2d 499.

The writ of the District Court was directed to Fay as Warden of Green Haven Prison. The order and opinion run only against Warden Fay, and not against the State of New York (2a, 3a, 81a), and the certificate of probable cause names only respondent Fay.

Only the State of New York prosecuted the appeal to the Court of Appeals. Since it was not a proper party, the appeal should have been dismissed by reason of Fay's failure to prosecute the appeal.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME J. LONDIN,
Counsel for Petitioner.

APPENDIX A

New York Correction Law

§218. Board of parole to act on violations of parole.

Whenever there is reasonable cause to believe that a prisoner who has been paroled by the state board of parole has violated his parole, such board of parole at its next meeting shall declare such prisoner to be delinquent and time owed shall date from such delinquency. The warden of each prison and the superintendents of the other institutions named in section two hundred and ten of this article shall promptly notify the state board of parole of the return of a paroled prisoner charged with violation of his parole. Thereupon, such board of parole shall, as soon as practicable, hold a parole court at such prison and consider the case of such parole violator, who shall be given an opportunity to appear personally, but not through counsel or others, before such board of parole and explain the charges made against him. The board of parole shall within a reasonable time act upon such charges, and may, if it sees fit, requi[illegible] such prisoner to serve out in prison the balance of the maximum term for which he was originally sentenced calculated from the date of delinquency or such part thereof as it may determine, or impose such punishment as it deems proper, subject to the provisions of the next section. As amended L. 1945, c. 678, §3, eff. July 1, 1945.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 301—October Term, 1962

(Argued April 17, 1963 Decided May 1, 1963)

Docket No. 27987

THE UNITED STATES OF AMERICA, *ex rel.* ROBERT WEBER,
Petitioner-Appellee,

against

PEOPLE OF THE STATE OF NEW YORK,
Appellant,

and

EDWARD M. FAY, Warden of Green Haven Prison, Stormville, New York,
Respondent.

Before:

SMITH, KAUFMAN and MARSHALL, *Circuit Judges.*

Appeal by the State of New York from an order of the United States District Court for the Southern District of New York, Noonan, *J.*, granting Robert Weber's petition for a writ of habeas corpus. Reversed, with instructions to dismiss the writ.

Appendix B

PHILIP WEINBERG (Louis J. Lefkowitz, Attorney General of the State of New York, on the brief), (Samuel A. Hirshowitz, First Asst. Att'y. General and Vincent A. Marsicano, Asst. Att'y. General, of counsel), *for Appellant.*

JEROME J. LONDIN, New York City, (Harvey P. Dale, of counsel), *for Appellee.*

MARSHALL, *Circuit Judge*:

This is an appeal by the State of New York from an order of the United States District Court for the Southern District of New York, Noonan, *J.*, sustaining a writ of habeas corpus and directing that the petitioner, Robert Weber, be released from the custody of the warden of Green Haven Prison.

The record made at the hearing in the District Court establishes the factual background against which Judge Noonan found that Weber's constitutional rights had been violated and that he was entitled to be released. On June 6, 1950, Weber was convicted in the Court of General Sessions, New York County, of robbery in the second degree and was sentenced to serve a term of from five to ten years in state prison. He was received in prison the following day and remained there until September 21, 1953, when he was paroled, with a maximum expiration date of April 26, 1960. The Certificate of Release on Parole which Weber signed at that time imposes a number of conditions upon the parolee; in accepting parole on these conditions, Weber promised, *inter alia*, "I will report to my parole officer each and every time I am arrested or questioned by officers of any law enforcement agency

and will give all of the facts and circumstances which brought about the arrest or questioning."

Weber remained free on parole until February 25, 1960, when two detectives from the Safe and Loft Squad of the New York City Police Department came to his home at 4:40 a. m., and took him to police headquarters for questioning in connection with an assault and robbery that had taken place during the night. According to his parole officer, Weber admitted to him in the course of the questioning that he had "taken a couple of pinches" for gambling while on parole. Subsequent investigation revealed that Weber had been arrested for disorderly conduct on December 17, 1955, during a raid on a dice game and later that day had been convicted and fined $2 in Magistrate's Court of the City of New York. At no time had Weber reported his arrest and conviction to the parole authorities.

Upon learning of the existence and concealment of this arrest and conviction, Weber's parole officer issued a warrant for his return to prison for violation of parole. On April 20, 1960—six days before the original expiration date of Weber's sentence—the Board of Parole, pursuant to § 218 of the New York Correction Law, held a hearing at which Weber appeared. After completion of the hearing, the Board ruled that Weber had violated the conditions of his parole as of December 17, 1955, and ordered him held in prison, charged with four years, two months, and twenty-eight days in delinquent time; this time represented the balance of the maximum term for which he had been originally sentenced, calculated from the date of delinquency. The addition of this delinquent time extended the maximum expiration date of Weber's sentence to June 23, 1964.

Appendix B

After exhausting his state remedies, Weber filed his petition for a writ of habeas corpus. His primary contention before the District Court, as it had been before the Board of Parole and before the state courts, was that he was not the man arrested and convicted for gambling on December 17, 1955; the man who had been convicted that day, he argued, had falsely given the police Weber's name, address, and age as his own. Consequently, Weber contended, since he had never been arrested or convicted on the gambling charge, he obviously could have neither admitted the arrest and conviction to the authorities when he was questioned on February 25, 1960, nor concealed their existence from his parole officer at any time prior to that date. This issue of identity is precisely the issue that was before the Board of Parole at the revocation hearing. Because the police did not fingerprint the defendant in the 1955 disorderly conduct proceeding, conclusive proof on the issue of identity was not available to the Board. The Board therefore was compelled to determine whether to give greater weight, on the one hand, to Weber's assertion that he was not the same man who had been convicted, or, on the other hand, to the testimony of a parole officer and a detective that Weber admitted the conviction and to the existence of the conviction record itself. *See People ex rel. Weber v. Division of Parole*, 212 N. Y. S. 2d 761, 764-65 (Sup. Ct. 1961). The determination which a Board of Parole reaches in resolving such issues of fact—as it happened in the present case, adversely to Weber—may not be made the subject of attack in habeas corpus proceedings in the federal courts absent a demonstration of denial of a constitutional

right. *Escoe* v. *Zerbst*, 295 U. S. 490 (1935); *cf. Freedman* v. *Looney*, 210 F. 2d 56 (10 Cir. 1954). No such demonstration was made by Weber; and the District Court was correct in these circumstances in declining to enter upon a consideration of the quantum of proof that was before the Board of Parole. *Cf. Lopez* v. *Madigan*, 174 F. Supp. 919 (N. D. Calif. 1959); *United States ex rel. DeLucia* v. *O'Donovan*, 107 F. Supp. 347 (N. D. Ill. 1952); *Nave* v. *Bell*, 180 F. 2d 198 (6 Cir. 1950); *Fox* v. *Sanford*, 123 F. 2d 334 (5 Cir. 1941); *Rogoway* v. *Warden*, 122 F. 2d 967 (9 Cir. 1941).

Having thus properly put the question of identity to the side, the District Court went on "to address itself to what it considers the basic point, namely, did the State act with due diligence in declaring petitioner a parole violator as of December, 1955?" The Court found that it did not because "the Parole Board through its officers should have known, or in fact did know, of the existence of the arrest of this defendant in December 1955, but delayed for one reason or another to retake him into custody." The Court then had to determine whether this delay of more than four years—between the time at which the State was found to have learned of Weber's arrest and the time at which it moved to revoke his parole—was in violation of any of Weber's constitutional rights. Although recognizing that "the rights granted by the Sixth Amendment [do not] specifically refer to one placed in the limited atmosphere of parole," Judge Noonan held that "where, as here, the state knows or should have known of this petitioner's gambling arrest in 1955 (which he denies), and waits more than four years before revoking his parole and then extends the parolee's prison termina-

tion date, this court is of the opinion that such is an undue delay within the rationale of this amendment, if not specifically enunciated by it." Accordingly, the writ was sustained and Weber ordered discharged from custody.

The District Court's holding that the State had denied Weber his rights under the Sixth Amendment by failing to act with due diligence in revoking his parole thus rested, in the alternative, either on the finding of fact that the Board of Parole knew of the existence of his conviction in 1955 or on the conclusion of law that it should have known of its existence at that time. Because we believe that the District Court's finding of fact is clearly erroneous and its conclusion of law unwarranted on the record, we are compelled to reverse the judgment of the District Court and to order that the writ of habeas corpus be dismissed. See *United States ex rel. Sadness* v. *Wilkins*, 312 F. 2d 559 (2 Cir. 1963).

There was no direct testimony or evidence in the District Court to suggest that the Board of Parole had any knowledge whatsoever of Weber's 1955 arrest and conviction until he admitted their existence when he was questioned on February 25, 1960; moreover, there was uncontroverted testimony that it was only upon Weber's admission that the parole officials learned of his arrest and conviction for the first time. On this state of the record, the District Court's finding of fact that the Board of Parole knew of Weber's arrest and conviction before he admitted their existence in 1960 is clearly erroneous and may not do service as an alternate foundation for a holding of lack of diligence on the part of the State. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395

(1948); see *Romero* v. *Garcia & Diaz, Inc.*, 286 F. 2d 347, 356 (2 Cir.); *cert. denied*, 365 U. S. 869 (1961).

The District Court also held, however, that even if the Board of Parole did not actually know of the existence of the 1955 arrest and conviction until 1960, it should have known of their existence before that time inasmuch as thorough investigations into Weber's background were made in 1956, when he sought and received permission to go to Europe, and in 1959, when he was placed under scrutiny by the New York City Police Department and the Board of Parole. In these circumstances, Judge Noonan said, "This Court finds it inconceivable that experienced parole officers could not have uncovered the existence of such arrest on the occasion of the two investigations made of the petitioner. The records of Magistrate's Court are public and open to inspection." However, the reasons advanced by the State to explain its failure to learn earlier of Weber's arrest and conviction argue persuasively that the District Court's conclusion of law was in error. Since Weber was not fingerprinted in connection with the 1955 proceedings, the Board of Parole did not learn promptly that a parolee had been arrested and convicted, as it would have learned the very next day if fingerprints had been taken. Nonetheless, it is true, as the District Court pointed out, that the Board of Parole could have learned earlier of Weber's arrest and conviction by examining the records of the Magistrate's Court. However, the imposition of such a duty of inspection would be both unreasonable, because of the enormous task that the Board of Parole would face in maintaining a constant check on the hundreds of criminal courts in the State of New York in which its

thousands of parolees might happen to be convicted, and unwise, because the failure of the Board to make timely discovery of a conviction would result in automatic forfeiture of its statutory right to revoke the parole of a prisoner, even when the parolee had deliberately violated his agreement to report any convictions to the Board. Under the circumstances of the present case—in which the State would have learned of Weber's 1955 conviction promptly if Weber had lived up to the terms of his release on parole—we decline to announce that the Board of Parole had the duty to search the records of the Magistrate's Court upon pain of forfeiting the right to act for lack of diligence.

Our decision today is based upon the narrow ground that there is no support in the record for the finding of lack of diligence by the State in instituting the parole-revocation proceedings against Weber. We therefore obviously have no occasion to reach or pass upon the question of whether such lack of diligence, in circumstances in which it was clearly demonstrated, would constitute a denial of due process to a parolee. Compare *United States ex rel. Von Cseh* v. *Fay*, 313 F. 2d 620 (2 Cir. 1963).

Reversed, with instructions to dismiss the writ.

APPENDIX C

Opinion

The Court: The petitioner, Robert Weber, has applied to this Court for a writ of habeas corpus. After a careful review of the papers the Court ordered a hearing to be held to determine whether the petitioner's constitutional rights may have been violated by the determination of the New York State Parole Board that petitioner was a parole violator as of December 17, 1955, the result of which affected the extent of his sentence four years, eight months and twenty-eight days from the date of his parole revocation.

The record indicates that on June 6, 1950 petitioner was sentenced in the Court of General Sessions of New York County to serve a term of five to ten years in state's prison upon a conviction of robbery in the second degree. He was received in Sing Sing Prison on June 7, 1950 with a jail credit of 52 days. He was paroled from Wallkill State Prison on September 21, 1953 and was returned to Sing Sing Prison on March 25, 1960 as a parole violator charged (131) with owing four years, two months, twenty-eight days delinquent time. He was picked up as a parole violator just a few days before his parole was due to expire.

After a hearing held by a parole court at Sing Sing Prison on April 26, 1960 petitioner was declared delinquent as of December 17, 1955 and required to serve the aforementioned time. Petitioner is presently confined to Green Haven Prison and his maximum time will expire June 23, 1964.

The record further indicates that the basis for the April 26, 1960 decision of the Board of Parole declaring peti-

tioner delinquent as of December 17, 1955, was petitioner's conviction in a magistrates' court on December 17, 1955 of the offense of disorderly conduct (dice) for which he was fined two dollars.

In 1960 petitioner obtained a writ of habeas corpus in Supreme Court, Dutchess County, which writ was dismissed on October 31, 1960 after a hearing by the Honorable Leonard J. Supple, justice of the Supreme Court of the State of New York. Although represented by counsel the petitioner did not appeal from the order from Mr. Justice Supple.

Thereafter by notice of motion dated December (132) 16, 1960 petitioner brought a proceeding pursuant to Article 78 of the Civil Practice Act of the State of New York seeking a review and the setting aside of the action of the Division of Parole in declaring him delinquent.

This proceeding was decided adversely to petitioner by an order of Justice George M. Fanelli, Justice of the Supreme Court, entered in Westchester County on May 5, 1961. The order of Mr. Justice Fanelli was affirmed by the Appellate Division, Second Department. Leave to appeal to the Court of Appeals was denied by order of that Court dated January 25, 1962 under the title "In the Matter of the Application of Robert Weber for an order pursuant to Article 78 of the Civil Practice Act, Appellant, vs. Division of Parole of the State of New York, Respondent."

Certiorari was denied by the Supreme Court of the United States on May 21, 1962.

It appears therefore to this Court that petitioner has exhausted his State remedies.

Petitioner both in his own papers and in those filed by his court-appointed attorneys presents several grounds for suggesting a denial of his constitutional rights.

Appendix C

(133) In studying the various points raised this Court will address itself to what it considers the basic point, namely, did the State act with due diligence in declaring petitioner a parole violator as of December, 1955?

Petitioner throughout all the hearings both in the state courts and here in federal court has steadfastly maintained that he was not the man arrested on December 17, 1955 as claimed by the State. That such arrest served as the basis for his later being declared a parole violator is abundantly clear inasmuch as the State required him to serve the remaining time from the date of that arrest. It is the petitioner's contention that the parole court's determination in adjudging him a parole violator was based on insubstantial evidence and hence denied him his liberty without substantial evidence. (See Escoe v. Zerbst, 295 U. S. 490.)

This Court has listened carefully to all of the testimony and has studied the record as a whole, and finds that the parole court of the State of New York acted in a manner inimical to petitioner's constitutional rights.

(134) Section 210 of the Correction Law, McKinney's Consolidated Laws of New York Vol. 10-B reads in part as follows:

> ". . . The division of parole shall also be charged with the duty of supervising all prisoners released on parole from the prisons of the state, of making such investigations as may be necessary in connection therewith, of determining whether violation of parole conditions exists in specific cases and of deciding the action to be taken with reference thereto. . . ."

Appendix C

On two separate occasions the Parole Board thoroughly investigated the petitioner's record while he was out on parole.

From the testimony it appears that the petitioner in February of 1956 sought permission from the Parole Board to escort his daughter on a trip to Europe. At that time a thorough investigation was made of the petitioner's record and he was found to be in good standing. Permission for the trip was granted and petitioner went to Europe.

Again in September of 1959, the petitioner was placed under close scrutiny by the New York Police Department and the Parole Board. At that time the record indicates no action was forthcoming to retake the petitioner into custody.

(135) The State defends the delay in uncovering the existence of the arrest in December 17, 1955 by maintaining that it would be impossible for it to uncover an arrest where, on the occasion of the arrest, no fingerprints were made as is the case here. They assert the first time they knew of such arrest was in February of 1960 when Weber admitted that "he took a couple of pinches" for gambling, which admission led to the uncovering of the arrest record in Magistrate's Court.

This Court finds it inconceivable that experienced parole officers could not have uncovered the existence of such arrest on the occasion of the two investigations made of the petitioner. The records of Magistrate's Court are public and open to inspection.

I feel that the Parole Board through its officers should have known, or in fact did know, of the existence of the arrest of this defendant in December 1955, but delayed for one reason or another to retake him into custody.

Appendix C

We now come to the question of whether such delay was a denial of petitioner's constitutional rights. The petitioner, it must be pointed out, denies that he was the man arrested on December 17, 1955 and claims the parole hearing afforded him was unfair. (136) This court, however, will limit itself to the petitioner's claim that the State's undue delay denied petitioner his constitutional rights, since I believe I should not consider the quantum of proof before the Parole Board.

The freedom granted to a parolee is of course limited by the restrictions set by the parole board. Nor do the rights granted by the Sixth Amendment specifically refer to one placed in the limited atmosphere of parole. That one on parole can be retaken without a trial is well founded in our law. However, where, as here, the state knows or should have known of this petitioner's gambling arrest in 1955 (which he denies), and waits more than four years before revoking his parole and then extends the parolee's prison termination date, this court is of the opinion that such is an undue delay within the rationale of this amendment, if not specifically enunciated by it. Certainly a parolee should be given some timely and reasonable opportunity to explain or defend against a charge of parole violation. Parole is a right, if only a limited right. If the petitioner had been apprehended sooner, perhaps he could have explained the arrest or been able to produce witnesses who could have aided him or the state.

The writ is therefore sustained and the petitioner is discharged from custody.

The State's motion to dismiss for lack (137) of jurisdiction is denied.

So ordered.

* * * * *

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Supreme Court of the United States

No. 229—OCTOBER TERM, 1963

ROBERT WEBER,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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NO. 229—OCTOBER TERM, 1963

ROBERT WEBER,

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

This brief is submitted in opposition to the petition for certiorari to the United States Court of Appeals, Second Circuit, seeking review of a judgment of that Court which reversed an order of the District Court, Southern District of New York, and dismissed a writ of habeas corpus. The Court of Appeals denied petitioner's motion for rehearing by order dated May 10, 1963.

Reported below: 316 F. 2d 603.

Petitioner was convicted of robbery second degree in the Court of General Sessions, New York County, on June 6, 1950 and was sentenced to five to ten years' imprisonment. On September 21, 1953 he was paroled. He was returned to State Prison March 25, 1960 as a parole violator as a result of which his maximum expiration date was extended to June 23, 1964, subsequently extended by his release as ordered by the District Court.

Subsequent to his parole, in the fall of 1959 petitioner was observed on several occasions driving a car without permission, in violation of his parole agreement (28a, 58a, 65a-66a),* and was under the surveillance of the New York City Police Department in connection with several robberies in Brooklyn, where he then resided. On February 25, 1960 one Andreyev, presently in Federal prison, was arrested and the police found on his person the key to a safe-deposit box in petitioner's name (41a, 58a). Accordingly, that morning petitioner was questioned by police, in the presence of his parole officer. The Division of Parole lodged a warrant against him at that time for consorting with criminals, and, in the course of the questioning, the parole officer, Joseph Sullivan, asked him to explain the fact that he had deposited large sums of money—$1,100 in one recent week—in his bank account (42a). Petitioner's response was that he "was a gambler." When Sullivan asked him for some proof of this gambling, petitioner admitted that he had been arrested for gambling while on parole (42a).

Subsequent investigation by the police revealed that petitioner had in fact been arrested for disorderly conduct on December 17, 1955 during a raid on a dice game and had been convicted and fined in Night Magistrates Court, Borough of Manhattan, New York City, on that date (32a-33a; Resp. Exhs. 2, 3). No fingerprints had been taken either upon arrest or at the Court (64a). Despite the express requirement in his parole agreement that he inform his parole officer of any arrests or convictions, it is undenied that petitioner had not at any time disclosed this incident during the four years since its occurrence (32a-33a, 42a, 64a).

Since both the conviction itself and its concealment constituted serious breaches of the parole agreement—in addi-

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* Unless otherwise indicated, numbers in parentheses refer to pages in respondent's appendix in the Court of Appeals.

tion to the subsequent violations of driving and consorting in 1959—the Division of Parole declared petitioner delinquent as of December 17, 1955 (the date of the gambling conviction), pursuant to New York Correction Law § 218. He was returned to State Prison March 25, 1960 as a parole violator, charged with four years, two months and twenty-eight days' delinquent time. The addition of this delinquent time extended his maximum expiration date to June 23, 1964 and, after a statutory parole court hearing, held at Sing Sing Prison on April 20, 1960, he was ordered held until that date. The hearing was presided over by three Commissioners of the Division of Parole, and petitioner there testified at length, admitting that he breached his parole by illegally driving a car, but denying commission of the gambling offense which he had previously admitted to his parole officer (42a).

Prior Proceedings

Thereafter petitioner applied for habeas corpus in the New York Supreme Court, Dutchess County, asserting that the Division of Parole was without jurisdiction to declare him a parole violator on the grounds that (1) he had not in fact been convicted on December 17, 1955 and (2) that the revocation of his parole was invalid since the conviction was a public record and the Division's alleged laxity in not discovering it sooner amounted to a waiver. After a plenary hearing at which petitioner and parole officer Sullivan testified; by order dated November 28, 1960 the Court dismissed the writ, holding there was no showing of lack of diligence since "it cannot be said that the Parole Board had reasonable cause to believe that Weber had violated his parole before * * * March, 1960." Cited in a subsequent proceeding, *People ex rel. Weber v. Division of Parole*, 212 N.Y.S. 2d 761, 764 (Sup. Ct., Westchester Co., 1961), aff'd 15 A. D. 2d 499 (2nd Dept., 1961), lv. to app. den. 11 N. Y. 2d 642 (1962), cert. den. 369 U. S. 890 (1962).

With regard to the claim of waiver, the Court found "not a bit of evidence * * * that the parole board or its parole officer knew about the gambling and the arrest for disorderly conduct at any time before February 25, 1960." *People ex. rel. Weber* v. *Division of Parole, supra*, 212 N.Y.S. 2d 761, 764.

Petitioner did not appeal from this decision but brought a proceeding in the nature of mandamus under Article 78, Civ. Prac Act, in Supreme Court, Westchester County, raising the identical claims, which was likewise dismissed with a lengthy opinion expressly holding that the issue of petitioner's identity could not be reviewed, absent a showing of violation of some statutory duty on the part of the Parole Board, and that petitioner had failed to meet that burden, 212 N.Y.S. 2d 761, 762-763. It is significant that petitioner was represented by counsel in all these state court proceedings and that he failed to claim at any time that his rights under the Sixth Amendment, or any constitutional provision, had been violated. That case was, as we showed, carried all the way up to this Court.

The instant proceeding then was commenced in the Southern District of New York and a writ was issued by NOONAN, D. J., on October 31, 1962. On November 20, 1962 a hearing was held at which both sides presented testimony.

The Hearing and Decisions Below

At the hearing, petitioner testified that he was paroled September 26, 1953 and that on February 25, 1960 a parole violation warrant was lodged against him "for delinquency alleged on December 17, 1955, on alleged dice game arrest" (19a). He stated he was detained pursuant to that warrant for fifteen days, after which he was questioned by parole officers who promised to release him if he divulged certain information, which he refused to do (21a). At this

time, he testified, he denied involvement in any dice game on the date in question (22a).

Thereafter, at the parole violation hearing held on April 20, 1960, petitioner stated he was again asked to give "certain people's names" and again refused, and likewise reiterated his denial of the dice game and arrest (23a-24a, 26a).

On cross-examination, petitioner admitted that in 1955 he resided at 230 West End Avenue, New York City (26a). This, coupled with the fact that he was thirty years of age in 1955 (19a), coincides exactly with the records of his arrest and conviction (32a; Resp. Exhs. 2, 3), which expressly show that a Robert Weber, thirty years of age, white, and of that address, was arrested and pleaded guilty to disorderly conduct. It is to be noted that petitioner was *not* fingerprinted at the time of this arrest.

Petitioner conceded that he violated his parole by driving a car without the permission of his parole officer in 1959 (28a) and that he admitted this at his parole violation hearing (37a-38a).

Sullivan, the parole officer assigned to the supervision of petitioner from 1957 to the time of his arrest in 1960, testified that on February 25, 1960 he received a call from a New York City detective, Thomas Swift, advising him that petitioner had been arrested. He stated (41a-42a):

> "At the same time they had picked up a well known burglar who had a key to a safe deposit box that was registered to Robert Weber's name. So at that time I took out a warrant for his association and I went to the Safe and Loft Squad and after they finished questioning him I lodged a warrant against him.
>
> Now, during the questioning I questioned him about his finances and he had deposited, I believe it was $1,100 in a week. I asked him about this and he said

> he was a gambler. So I asked him how he could prove he was a gambler.
>
> He said, 'Well, I took a couple of pinches while on parole,' and the police checked this out and they came up with the arrest on December 17, 1955. But that was the first time I knew of his arrest, the morning of February 25, 1960."

Sullivan explicitly stated that petitioner had never informed him of his arrest or conviction—itself a violation of the parole agreement (42a; Resp. Ex. 1, Q. 16). He testified that, when he confronted petitioner with the arrest records showing the gambling charge, petitioner stated that, " 'I can't recall being arrested. I remember being picked up' " (42a). Sullivan testified he then lodged the parole violation warrant against petitioner (43a; Resp. Exh. 4).

On cross-examination, Sullivan explained the procedure followed when a parolee is arrested, noting that in cases where fingerprints are taken, the New York City Police Bureau of Criminal Identification informs the Division of Parole within a day that a parolee has been apprehended. He specifically testified (53a):

> "[I]f he is arrested and he is fingerprinted, I usually know the following morning."

Here, however, Sullivan stated, since petitioner had not been fingerprinted upon his arrest, "it would be very difficult [to know of the arrest], unless somebody told us that he was arrested * * *" (54a).

The Court itself noted (55a):

> "[Sullivan] said nobody would ever know it unless fingerprints were taken, not from the arrest record alone."

Richard Fowler, petitioner's parole officer from April 1955 to May 1956, expressly testified that petitioner had

never informed him of any arrest or conviction during this period, which encompassed the day of his arrest (64a). He stated that no fingerprints were received from the police or any other agency during the period of his supervision of petitioner indicating any arrest or conviction of petitioner (64a).

The final witness, Thomas Swift, the New York City police detective, told of the circumstances of petitioner's 1960 arrest, noting that he had been observed driving a car in violation of his parole agreement for several months prior thereto (65a-66a). Swift, in addition, told of petitioner's admission of the parole violation to Sullivan and himself, bolstering Sullivan's testimony (66a), and likewise explained that petitioner's arrest was the direct result of the apprehension by federal authorities of Andreyev, the burglar who had a key to petitioner's safe-deposit box (72a).

It is undisputed that petitioner was not fingerprinted upon his 1955 arrest for gambling, so that, until he admitted it to his parole officer upon his subsequent questioning in 1960, the Parole Board had no way of knowing of it. Thus, any contention that the Board failed to use diligence is utterly unsubstantiated by any testimony.

Yet, on December 3, 1962 the District Judge rendered an oral decision sustaining the writ and ordering the release of petitioner (81a-88a). He found the Parole Board "should have known, or in fact did know, of the existence of the arrest of this defendant in December, 1955, but delayed for one reason or another to retake him into custody" (85a).

The Court concluded that the asserted delay was violative of petitioner's constitutional rights under the Sixth Amendment, since (85a):

> "where, as here, the state *knows or should have known* of this petitioner's gambling arrest in 1955 (which he denies), and waited more than four years before re-

> voking his parole and then extends the parolee's prison termination date, this court is of the opinion that such is an undue delay within the rationale of [the Sixth] amendment, if not specifically enunciated by it." (Emphasis supplied)

The District Court did, however, reject petitioner's claim that he was not in fact arrested in 1955, since it felt it "should not consider the quantum of proof before the Parole Board" (85a). It based its entire decision on the theory that the alleged lack of diligence of the Parole Board was violative of the Sixth Amendment—a conclusion which, we urge, lacks *any* basis either in fact or in law.

The Court of Appeals, Second Circuit, unanimously reversed the District Judge's order and dismissed the writ, by order dated May 1, 1963 (316 F. 2d 603). The opinion by MARSHALL, Cir. J., expressly rejected the factual findings of the lower Court, noting that (p. 605):

> "[t]here was no direct testimony or evidence in the District Court to suggest that the Board of Parole had any knowledge whatsoever of Weber's 1955 arrest and conviction until he admitted their existence when he was questioned on February 25, 1960; moreover, there was uncontroverted testimony that it was only upon Weber's admission that the parole officials learned of his arrest and conviction for the first time. On this state of the record, the District Court's finding of fact that the Board of Parole knew of Weber's arrest and conviction before he admitted their existence in 1960 is clearly erroneous and may not do service as an alternate foundation for a holding of lack of diligence on the part of the State." (Citing cases.)

The Court rejected the view advanced by petitioner that the Board of Parole in some way "should have known"

of the existence of the gambling conviction although petitioner concededly did not disclose it—itself a violation of his parole agreement and a ground for revocation of his parole. It held (p. 606):

> "Since Weber was not fingerprinted in connection with the 1955 proceedings, the Board of Parole did not learn promptly that a parolee had been arrested and convicted, as it would have learned the very next day if fingerprints had been taken. Nonetheless, it is true, as the District Court pointed out, that the Board of Parole could have learned earlier of Weber's arrest and conviction by examining the records of the Magistrate's Court. However, the imposition of such a duty of inspection would be both unreasonable, because of the enormous task that the Board of Parole would face in maintaining a constant check on the hundreds of criminal courts in the State of New York in which its thousands of parolees might happen to be convicted, and unwise, because the failure of the Board to make timely discovery of a conviction would result in automatic forfeiture of its statutory right to revoke the parole of a prisoner, even when the parolee had deliberately violated his agreement to report any convictions to the Board. Under the circumstances of the present case—in which the State would have learned of Weber's 1955 conviction promptly if Weber had lived up to the terms of his release on parole—we decline to announce that the Board of Parole had the duty to search the records of the Magistrate's Court upon pain of forfeiting the right to act for lack of diligence."

Significantly, the Court of Appeals specifically based its decision "upon the narrow ground that there is no support in the record for the finding of lack of diligence by the State in instituting the parole revocation proceedings against Weber. We therefore obviously have no

occasion to reach or pass upon the question of whether such lack of diligence, in circumstances in which it was clearly demonstrated, would constitute a denial of due process to a parolee." 316 F. 2d, at page 606.

Thus, far from raising a "major issue [of] the applicability of the Fourteenth Amendment to the hearing of a parole court," as petitioner would have us believe (Pet. for Cert., p. 12), the decision of the Court of Appeals was in fact based on the "narrow ground," to use the Court's own phrase, that the *facts* adduced below failed to support the District Judge's finding of a lack of diligence. The Court explicitly left open the question of law as to whether lack of diligence by a parole board, where proven, would constitute a denial of due process. Rather than a broad legal issue, we have here an unusual factual situation and a decision predicated on a failure of proof at the hearing.

ARGUMENT

The decision below was predicated solely on the factual issues involved and presents no substantial question worthy of consideration by this Court.

Petitioner contends the District Court erred in "declin[ing] to consider [his] proof that he had not committed the violation and that the Parole Board hearing was constitutionally inadequate" (Pet., p. 2). In point of fact, there was no "proof that [petitioner] had not committed the violation" at all. The testimony showed that a man giving his name as Robert Weber, with the same age and address, was arrested and convicted on December 17, 1955 (32a-33a). In addition, petitioner's parole officer and the police detective testified he had admitted gambling arrests during this period (42a, 66a). Even

were we to assume, *arguendo*, that the District Court had the power to relitigate the factual basis for a finding by the Parole Board that a State prisoner had violated his parole, there is ample evidence to more than offset petitioner's self-serving declarations of innocence and to sustain the Board's findings. Of course, both Courts below agreed that the quantum of proof before the State Board of Parole did not constitute a federal issue to be litigated on habeas corpus, and this is unquestionably correct. *Lopez* v. *Madigan*, 174 F. Supp. 919 (D. C. Calif.); *U. S. ex rel DeLucia* v. *O'Donovan*, 107 F. Supp. 347 (D. C. Ill.); *Yaire* v. *Bell*, 180 F. 2d 198 (6 Cir.).

Contrary to petitioner's claim; either the commission of a criminal offense, or failure to disclose an arrest or conviction, violates the parole agreement and constitutes grounds for revocation of parole. The record contains ample proof that petitioner committed the offense—both his admission and the conviction certificate. The failure to disclose the arrest and conviction until years later is conceded. Thus petitioner's insistence that he did not admit the conviction (Pet., pp. 9-10) is immaterial in the light of the testimony of the parole officer and the detective that he admitted the arrest in 1960 (42a, 66a), and the testimony of his prior parole officer that he concealed it at the time (64a).

Petitioner makes much of our failure to call the officer who had arrested him in 1955, one Parotta (Pet., pp. 10-11). If he deemed Parotta's testimony helpful petitioner could have subpoenaed him at the District Court hearing, at which he was represented by counsel of his choice, and during which he was undeniably aware of Parotta's name (77a). If Parotta did not testify petitioner may not be heard to complain. None of these factual issues show any defect or unfairness in the hearing of a scope which would bring this case within the principle of *Townsend* v. *Sain*, 372 U. S. 293, as petitioner asserts. This

claim is rendered somewhat ironic by the fact that petitioner was successful in obtaining his release at the very hearing which he now urges to have been unfair.

It is misleading to state that the certificate of conviction was "prepared on December 9, 1960—five years later" (Pet., p. 11). The certificate was transcribed from the records of the Court which were entered on the date of the conviction in 1955, and was certified as an accurate copy by the Clerk of the Court.

Clearly, the finding of the Court of Appeals that petitioner failed to prove any lack of diligence on the part of the parole authorities is a *factual* finding. The Court explicitly rested its decision on that "narrow ground" and the question "whether such lack of diligence, in circumstances in which it was clearly demonstrated, would constitute a denial of due process to a parolee" was expressly left open by the Court of Appeals. 316 F. 2d at page 606. Thus the question of the applicability of the due process clause to a parolee is not properly before this Court. The decision sought to be reviewed rested on a factual determination and the Court of Appeals did not have to, and did not in fact, rule on the constitutional question which petitioner is attempting to inject into this case.

The other claims advanced by petitioner are hypertechnical and have little to do with the real issues with which the courts below dealt. There is no issue in this case of "receipt in evidence of a statement * * * allegedly made during an illegal arrest," as petitioner claims (Pet., p. 13). The arrest was legal since the police had reason to believe petitioner had been involved in burglaries and the safe-deposit box of the burglar Andreyev was found to be in petitioner's name (41a, 58a, 67a). N. Y. Code Crim. Pro. § 177. Surely the police, who had had petitioner under surveillance for some time (66a-67a), had reasonable cause to believe a felony had been committed (by petitioner's associate Andreyev) and that petitioner was involved in it.

Petitioner never challenged the legality of his arrest below, and it may not be reviewed by habeas corpus in any event. *U. S. ex rel. Spinch* v. *Ragen*, 246 F. 2d 264 (7 Cir.). At no time in any of these proceedings has petitioner ever claimed that his admission was coerced in any way. Indeed, he denies that he ever made the admission at all. No evidence was unlawfully obtained through search or seizure, so that petitioner's reliance on *Mapp* v. *Ohio*, 367 U. S. 643, is misplaced. Similarly, *Wong Sun* v. *U. S.*, 371 U. S. 471, is irrelevant to the instant case. It concerned itself with a plainly illegal arrest by *Federal* agents for a Federal crime—transporting narcotics—and held that admissions made by the defendants at the time were inadmissible in a subsequent criminal prosecution. To urge that this holding should apply to statements made by a State parolee during a lawful arrest is to utterly distort its meaning; to say nothing of the fact that the acts petitioner claims to have violated the rule of *Mapp* and *Wong Sun* occurred in 1960, well before these decisions were handed down.

Ker v. *California*, 31 U.S.L. Week 4611, 373 U. S. ——, decided June 10, 1963, does not advance petitioner's position. It upheld the validity of an arrest where the justification for proceeding without a warrant was if anything, less clear than in the case at bar; and went on to sustain the conviction.

The plain fact is that, as both the State courts and the United States Court of Appeals specifically found, petitioner, in answer to his parole officer's questions as to his large bank balance, volunteered the information that he had been arrested for gambling (42a, 66a) in order to provide an explanation for his deposits. Clearly, the police and parole officer had the right to question petitioner, in view of their apprehension of Andreyev a few hours before, and the information petitioner himself supplied—conveniently denied at the habeas corpus hearing—was not obtained from him in contravention of the Fourteenth

Amendment. This assertion was never raised in the State courts or the District Court and we submit it is the flimsiest of afterthoughts.

Similarly, petitioner's contention that he was not represented by counsel at the statutory parole violation hearing (Pet., p. 14) is not germane to this appeal and was not advanced below. Of course a parolee is in constructive custody even while outside prison walls, see *Jones* v. *Cunningham*, 371 U. S. 236 (1963), and it is fundamental that the constitutional right to counsel applicable to a criminal trial is not required in the case of a parole violation hearing. *People ex rel. Oddo* v. *Fay*, 13 N. Y. 2d —— (July 10, 1963). Indeed, the constitution does not require any hearing at all, *Escoe* v. *Zerbst*, 295 U. S. 490; *Hughes* v. *Heinze*, 268 F. 2d 864 (9 Cir.); and the right to counsel conferred by the Sixth Amendment does not even apply to Federal parole violation hearings, let alone State proceedings. *Martin* v. *U. S. Board of Parole*, 199 F. Supp. 542 (D.C.D.C.). The hearing held by the Division of Parole here was in full compliance with New York Correction Law, § 218, and in any event the proof of petitioner's parole violation is not reviewable under habeas corpus, as both the District Court and the Court of Appeals properly held. 316 F. 2d, at page 605; *cf. Lopez* v. *Madigan*, *supra*, 174 F. Supp. 919. This proof was based on court and police records and it is plainly unassailable here. In passing, *People* v. *Waterman*, 9 N. Y. 2d 561, cited by petitioner, dealt with the right to counsel in post-indictment questioning prior to a criminal prosecution, and is irrelevant to this case.

Petitioner's claim that the parole violation warrant was too vague (Pet., pp. 14-15) is neither properly raised nor relevant. The argument was never raised in the State courts, and was only parenthetically referred to in the District Court (43a). It, too, has nothing to do with the issues in this case as defined by the Courts below. Moreo-

over, an objection to the form of the warrant lodged against petitioner is not a valid ground for habeas corpus, even had it been properly raised, just as the writ may not be used to attack the validity of an indictment or information. *U. S. ex rel. Sprach* v. *Ragen, supra*, 246 F. 2d 264; *cf. Winston* v. *U. S.*, 224 F. 2d 337 (2 Cir.), cert. den. 350 U. S. 916.

People v. *Oskroba*, 305 N. Y. 113, cited by petitioner, has nothing to do with this case. It concerned a probation violation hearing before the sentencing court, in which the statute (Code Crim. Proc. § 935) guarantees the probationer "an opportunity to be heard." The Court of Appeals properly there sustained both the factual basis for the revocation of probation and the procedure employed, specifically holding no formal hearing was necessary, 305 N. Y., at p. 117. Surely, there is nothing unconstitutional in the fact that the New York Legislature has determined that probation, imposed by the Court, shall be revoked by the Court, while parole, granted by the Board of Parole, shall be revoked by that body. The parole statute (Correction Law § 218) also requires an opportunity to be heard, and this was afforded petitioner at the parole board hearing of April 20, 1960.

The assertion that the parole board hearing was held in April, 1960 rather than March (Pet., p. 15) amounts to a grasping at straws. Petitioner was arrested February 25, 1960 (21a) and returned to State prison *March 25, 1960*, as he himself concedes (Pet., p. 6). Thus, the hearing was held at the next meeting of the parole board after his return to State prison, just as Correction Law § 218 then required. The plain language of the statute provides that the parole court be held at State prison, and not in the New York City House of Detention where petitioner remained from February 25 to March 25 (23a). Petitioner continually refers to a supposed "delay" in the holding of the parole court hearing, trying to create the impres-

sion that the Parole Board was dilatory, when in point of fact it was petitioner himself who—in plain breach of his agreement, and hence itself a ground for revocation of parole—failed to disclose his arrest and conviction to the parole authorities for over four years. The Court of Appeals laid to rest any doubt which could have existed as to this point by specifically finding as a fact that "there was uncontroverted testimony that it was only upon Weber's admission that the parole officials learned of his arrest and conviction for the first time." 316 F. 2d, at p. 605.

Finally, petitioner's argument that the fact that the State of New York, rather than the Warden, prosecuted the appeal from the District Court in some way deprived the Court of Appeals of jurisdiction, is unworthy of serious consideration. The Warden's interest in petitioner is custodial only; and the People of the State are a proper party on appeal. Of course the State is the real party in interest. *Knewel* v. *Egan*, 268 U. S. 442; *cf. U. S. ex. Williamson*, 255 F. 2d 512, 515 (5 Cir.). Both the State and the Warden are represented by the Attorney General in any event. To speak of Warden "Fay's failure to prosecute the appeal" (Pet., p. 16) is to attempt to employ trivia and ignore the merits of the controversy. *Commanding Officer, U. S. Army Base* v. *U. S. ex rel. Biananis*, 207 F. 2d 499 (6 Cir.), which dealt with military authorities, and in which a motion to dismiss was timely made, unlike the case at bar, is clearly not in point. Petitioner's counsel entered into stipulations with counsel for respondent during the pendency of the appeal in the Court of Appeals and never moved to dismiss. Moreover, New York Civil Practice Act, § 1274 requires that an appeal be taken in the name of the People of the State of New York. Indeed, under New York law the Warden is not a proper appellant in this situation. *People ex rel. Berman* v. *McDonnell*, 269 App. Div. 864 (2nd Dept.).

None of the arguments advanced by petitioner raise any substantial question which would warrant the taking of jurisdiction by this Court. The decision of the Court of Appeals was plainly rendered on a factual basis, and petitioner's assertions represent an attempt to create broad issues of law where none were passed on below.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, N. Y., July 18, 1963.

Respectfully submitted,

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